United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

573

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,718

UNITED STATES OF AMERICA

v.

JAMES N. NORRIS

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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TABLE OF AUTHORITIES

CASES:

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STATEMENT OF ISSUES PRESENTED

In the opinion of appellant, the following issues are presented:

1. Whether appellant's motions for acquittal with respect to the first six counts of the indictment should have been granted in the absence of proof that heroin was present in the capsules acquired from defendant.

2. Whether 21 U.S.C. 174, providing for a presumption of knowledge of illegal importation of a narcotic drug, as applied to appellant, is constitutional.

3. Whether 26 U.S.C. 4704(a), making it illegal for one to purchase or sell narcotic drugs not in or from an original stamped package, as applied to appellant is constitutional.

4. Whether 26 U.S.C. 4705(a) making illegal purchase of narcotic drugs without an official written order, as applied to this appellant, is unconstitutional.

5. Whether defendant's motion to suppress should have been granted on the ground that the search of defendant after his arrest was illegal and violated his constitutional rights.

6. Whether it was substantial error for the Court to have sentenced defendant without affording counsel for defendant an opportunity to be heard at the time of sentencing and without an opportunity to become acquainted with the presentence report.

7. Whether the issues raised are revieable and should be reviewed by this Court.

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JURISDICTIONAL STATEMENT

This is an appeal from a criminal conviction, after jury trial on six counts of an indictment, and after a trial before a judge on two counts of the same indictment, in the United States District Court for the District of Columbia.

Appellant was indicted for possession and sale of narcotic drugs in violation of 26 U. S. C. 4704(a), 4705(a) and 21 U. S. C. 174. Leave to appeal in forma pauperis has been granted. This Court has jurisdiction under 28 U. S. C. Section 1291.

REFERENCE TO RULINGS

1.	Denial of Motion to Dismiss the Indictment	December 1, 1967 Transcript of Pleadings, page 12
2.	Denial of Written Motion of Acquittal	December 6, 1969 Transcript of Pleadings, page 26.
3.	Adjudication of Conviction and Sentence by Judge Youngdahl	Transcript of Pleadings, page 27
4.	Adjudication of Conviction by Judge Green	December 16, 1968 Transcript of Pleadings, page 30
5.	Adjudication of Conviction and Sentence by Judge Green	Transcript of Pleadings, page 32
6.	Denial of Motion for Reduction of Sentence	Transcript of Pleadings, page 36.
7.	Oral denial of Motion for Acquittal	Transcript of October 9, 1968, page 77.
8.	Oral denial of Motion for Acquittal	Transcript of October 9, 1968, page 87.
9.	Ruling as to Lawful Arrest and Use of Fruits of Arrest	Transcript of December 16, 1968, pp. 19-20
10.	Denial by Judge Green of Motion for acquittal	Transcript, December 16, 1968, pp. 50-55
11.	Denial of Motion to Dismiss Count 8	Transcript of December 16, 1968, pp. 55-56

This case was mot previously before this court.

STATEMENT OF THE CASE

1. The Charges

In May 1967, an eight count indictment was returned against the defendant, James N. Norris. He was charged with having violated 26 U. S. C. 4705 (a), 26 U. S. C. 4704(a) and 21 U. S. C. 174, for alleged possession and sale of drugs. (Tr. of Pl.).

The first three counts concerned an alleged transaction occurring on or about February 20, 196 . According to these counts, defendant allegedly sold a narcotic drug, namely, six capsules containing a mixture of hydrochloride, quinine hydrochloride, manitol and milk sugar, without a written order and not from the original stamped package, and "facilitated the concealment and sale" of these capsules after the heroin hydrochloride had been illegally imported into the United States with Mr. Norris' knowledge. (Tr. of Pl.).

The next three counts made similar charges with respect to an alleged transaction occurring on February 23, 1967. (Tr. of Pl.).

The seventh count charged the defendant with having "purchased, sold, dispensed and distributed" not in or from the original stamped package a narcotic drug, namely, 160 capsules containing the above-mentioned mixture. The eighth count, with respect to the same 160 capsules, charged facilitation and concealment after importation contrary to law with the knowledge of the defendant. (Tr. of Pl., p. 10).

2. The Proceedings

Defendant entered a plea of not guilty. (Tr. of Pl.). Defendant's counsel thereafter made a motion to dismiss the indictment. (Tr.of Pl.,p.12), which was denied and a motion to sever certain counts and to have separate trials was granted (Tr. of Pl.). The first six counts

of the indictment were tried before a jury,with Judge Luther W. Youngdahl presiding, on October 9, 1968.

At the close of the Government's case, defendant moved for judgment of acquittal on all counts. The motion was denied. (Tr. of October 9, 1963, p.77). At the end of defendant's case, defendant renewed his motion for acquittal, which was again denied. (Tr. of October 9, 1968, p. 87). Subsequently, defendant's counsel filed a motion for acquittal on the ground that no measurable or usable amount of heroin had been shown in the capsules which contained a mixture of substances. This motion was denied. (Tr. of P., pp. 25a-26).

On December 6, 1968, Judge Youngdahl pronounced sentence. (Tr. of October 9, 1968, pp. 125-126), which was filed on December 10, 1968 (Tr. of Pl., p. 27). The Court imposed a sentence of 3 to 9 years on each of counts 2 and 5, the sentences to run concurrently. A sentence was imposed of 9 years on each of counts 1, 3, 4 and 6; said sentences to run concurrently and concurrently with sentences imposed on counts 2 and 5.

A jury trial was waived as to counts 7 and 8 and they were tried before Judge June L. Green on December 16, 1968. At the close of the Government's case, defendant moved for a judgment of acquittal, which was denied. (Tr. of December 16, 1968, pp. 50-55). Defendant then moved to dismiss count 8 and that motion was denied. (Tr. of December 16, 1968, pp. 55-56). Defendant was found guilty on both counts. (Tr. of December 16, 1968, p. 63).

Judge Green pronounced sentence on December 20, 1968. (Tr. of December 20, 1968 and Tr. of Pl., p. 32). The sentence imposed was: Three months to three years on count 7; fifteen years on count 8; said sentences to run councuurently by the counts and concurrently with sentence now being served. Notice of appeal was filed on December 20, 1968. (Tr. of Pl., p. 33).

Subsequently, counsel for defebdabt filed a motion for reduction of sentence, which motion was denied. (Tr. of Pl., p. 36.).

Appeals from these judgments were duly taken in forma pauperis.

3. Evidence at the trial before Judge Youngdahl.

An undercover agent, Officer Fairbanks, testified that on February 20, 1967, he purchased six capsules from the appellant. He testified he did not have a written order for these capsules and that there were no stamps attached to or around them. (Tr. of October 9, 1968, p. 28.).

Officer Fairbanks said that he then turned over the capsules to Detective Norman of the narcotics squad. (Tr. of October 9, 1968,p.29). Officer Fairbanks also testified that on February 23, 1967, he purchased another six capsules, without a written order and without seeing any stamps, from the defendant, and turned the capsules over to Detective Norman. (Tr. of October 9, 1968, pp. 31-32).

Detective Norman testified that he performed a preliminary test as to the first six capsules and then delivered them over to a government chemist, John Steele. (Tr. of October 9, 1968, pp. 57-58). He testified similarly as to the second six capsules, except that another policeman performed a preliminary test. (Tr. of October 9, 1968, pp 59-60.).

John Allen Steel.. a chemist employed by the Internal Revenue Service, testified that he had tested the six capsules given him on February 27, 1967 and found that they contained 342 milligrams of a white powder. (Tr. of October 9, 1968, pp. 63-65). He testified that after analysis there was left 302 milligrams of a white powder. He testified that he found quinine hydrochloride, manitol and milk sugar, and that 342 milligrams was the equivalent of $\frac{342}{28000}$ of an ounce.

(Tr. of October 9, 1968. pp. 65-66.).

Mr. Steel said that as to the other six capsules, they had 442 milligrams of a white powder before analysis and 312 milligrams after analysis. (Tr. of October 9, 1968, p. 67), containing quinine hydorchloride, manitol and milk sugar. (Tr. of October 9, 1968, p. 75). He testified that he did not test any of the white powder that he had not used up on his tests, but he considered that the test he made of the 40 and 30 milligrams was representative of the rest. (Tr. of October 9, 1968, pp. 72-73). The tests he made were qualitative and not quantitative, except for his weighing the amount of the white powder and the amount he used in his tests. (Tr. of October 9, 1968, p. 75.)

4. Evidence at the Trial Before Judge Green on December 12, 1968

Officer Robert L. Bush testified that he executed an arrest warrant against the defendant, James N. Norris, on March 6, 1967, in front of 1934-14th Street, N. W., Washington, D.C. (Tr. of December 12, 1968, pp. 8-9,11.). He said that his partner at that time searched the defendant who was patted down in a search for weapons and none were found. (Id., pp. 9, 23.).

Officer Bush testified that about 11:35 P.M., while in the Narcotics Section office, Officer Haskins searched the defendant again and seized from the latter's right hand pocket a plastic bag containing 160 capsules of a white powder. (Tr. of December 12, 1968, p. 10). He testified there were no stamps on the package. (Ibid.).

John Allen Steel, a chemist employed by the Internal Revenue Service, testified that he recieved the 160 capsules. (Tr. of December 12, 1968, p. 31). He said that he found 8,120 milligrams of a white powder before making an analysis, and 7,640 milligrams of a white powder after analysis. He said that he found this white powder to contain

7.6% of heroin hydrochloride, a total weight of 617 milligrams of heroin hydrochloride. He also said that he found 2% of quinine hydrochloride - 162 milligrams. (Tr. of December 16, 1968, p. 32.).

In making this test, Mr. Steel said that he removed a portion of the white powder from each capsule but did not test the remaining contents. (Tr. of December 16, 1968, pp. 33-37,47.). He testified that he made a quantitative analysis of 100 milligrams. (Id., p. 48.).

Mr. Steel said that he used several kinds of tests, one of which was a Marquis test, with respect to which he testified that one cannot be certain whether the substance tested is heroin hydrochloride, and that other tests are needed. (Tr. of December 16, 1968, p. 40.).

Defendant did not testify.

ARGUMENT

I. THE CONVICTION OF THE DEFENDANT ON THE FIRST SIX COUNTS SHOULD BE REVERSED BECAUSE OF ABSENCE OF ANY SUBSTANTIAL PROOF THAT HEROIN WAS PRESENT IN THE CAPSULES TAKEN FROM HIM.

(WITH REFERENCE TO THIS POINT, APPELLANT DESIRES THE COURT TO READ THE FOLLOWING PAGES OF THE REPORTER'S TRANSCRIPT, TRANSCRIPT OF OCTOBER 9, 1968, AND MOTION FOR ACQUITTAL AND ORDER OF JUDGE YOUNGDAHL, TRANSCRIPT OF PLEADINGS, PP. 25-26)

The defendant, James N. Norris, was tried before a jury on October 9, 1968. The indictment upon which he was tried and which was read to the jury contained six counts. (Tr. of October 9, 1968, p. 4.). Three counts had to do with an alleged transaction charged to have taken place on February 20, 1967; the other three counts related to an alleged transaction charged to have occurred on February 23, 1967. See Statement of Facts, supra p. 5).

Each count charged that defendant had been involved in an

illegal transaction with respect to a "narcotic drug," "that is, six capsules containing a mixture totaling about 342 milligrams of heroin hydrochloride, quinine hydrochloride, manitol and milk sugar." (Tr. of Pl.).

There was proof - contradicted - as to the sale of six capsules of some substance to government undercover agents. But there was, we believe a total or substantial absence of proof that the capsules contained heroin.

The following, so far as we have been able to ascertain from the record, is what was shown with respect to the contents of the six capsules "sold" on the 20th of February, 1967, and the six capsules "sold"on the 23rd of the same month.

An attempt by Officer Fairbanks to testify as to the contents was stricken by the Trial Court. (Tr. pp. 42-43.). Officer Fairbanks also testified that on February 20, 1967, he had asked defendant to sell him six capsules of heroin and defendant had then sold him six capsules. (Tr. of October 9, 1968, p. 28.). As to the transaction of February 23, 1967, he merely testified that he had asked "the defendant to sell me six capsules." (Tr. of October 9, 1968, p. 31.).

Officer Norman stated as to the first six capsules, that on February 21, 1967, he had performed a preliminary test on the portion of the powder and received a positive color reaction indicating it was of the opium group. There was no testimony as to what portion of the six capsules such test was made. (Tr. of October 9, 1968, p. 57.). As to the second six capsules, he testified that another police officer "performed a field test on one of the capsules and received a positive reaction indicating the presence of a narcotic." (Tr. of October 9, 1968, p. 59.). He testified again on cross examination as to the field tests, using a chemical prepared by the Treasury Department, but he acknowledged that

he was not a chemist. His knowledge appears to have been based upon hearsay, and when the Court stated, "The Government doesn't rely on this witness to show what the substance contained", defendant's counsel terminated his cross examination. (Tr. of October 9, 1968, pp. 62-63.). (Underlining supplied).

On cross-examination of Officer Fairfax the following occurred:

"Q. You said that the six capsules, according to your testimony on February 20, 1967, contained heroin?

The Court: Counsel, this is completely an unfair question. You made an objection to this testimony and I struck it out. I warned the jury to disregard it and I caution you once again about this." (Tr. of October 9, 1968, p. 43.).

The Government then put on a chemist to whom the capsules had been given for analysis. As to the first six capsules his testimony was:

". . .six capsules identified 342 milligrams of a white powder before analysis and 302 milligrams of a white powder after analysis. I found quinine hydrochloride, manitol and milk sugar." (Tr. of October 9, 1968, p. 65.).

As to the second six capsules his testimony was as follows:

"Q. What was the result of your test?

A. The result of my analysis, my original notes I put on the outside of this large envelope of Government's Exhibit 4, of the six capsules, 442 milligrams of a white powder before analysis and 312 of a white powder after analysis." (Tr. of October 9, 1968, p. 67.).

Government's exhibits 9 and 10 which appear to have been the chemist's analysis were marked for identification on cross-examination, (Id., p. 70.), but do not appear ever to have been offered into evidence.

On cross-examination, the chemist said that he had run a Marquis

test and that the test was positive with a purple color which indicates the presence of an opiate alkaliod. (Tr. of October 9, 1968, p. 75.). The following also occurred during cross-examination:

> "Q. Mr. Steel, I have the impression you said--if I am wrong correct me-- that in addition to heroin which you found in 40 millimeters which you used in one group and 30 in the other, you found other chemical substances?
>
> A. Yes. (Id., p. 75).

He went on to testify that quinine hydrochloride, manitol and milk sugar were not narcotics. (Tr. of October 9, 1968, pp. 75-76).

Almost a month after trial, counsel for defendant made a written motion for acquittal based upon the contention that the chemist had tested only a small portion of the capsules and had not made a quantitative analysis. In that motion counsel said:

> In support of this motion the defendant says that the only evidence introduced against him to prove the heroin content of the two groups of six capsules he allegedly sold on two days, respectively, to the undercover agent was the testimony of the chemist. This chemist testified that each group of six capsules weighed 342 milligrams and contained not only heroin hydrochloride but also certon non-narcotic substances such as milk sugar, quinine hydrcchloride, and manitol. (Tr. of Pl., p. 25a).

In its written order, denying the motion, the trial judge said:

> Upon a thorough review of the record in this case, the Court finds that there was sufficient evidence concerning the quantity of heroin hydrochloride to submit to the jury, and that the jury could reasonably have found that the sale involved a measurable and usable amount of heroin." (Tr. of Pl., p. 26).

The only reference to heroin during the trial, therefore, was an oblique reference by counsel for the defendant (Tr. of October 9, 1968 p. 75), a statement by counsel for the Government (Id., pp. 90, 96), and a reference to heroin, as we have noted, in the Court's order denying a

motion for acquittal.

The presence of heroin was so fundamental to the Government's case that counsel and the presiding judge appear to have taken for granted that its presence had been proved and concentrated their attention upon other problems, but such assumption cannot supply the lack of proof of such a fact. The transcript of hearings shows that the only qualified witness, the chemist, did not testify as to the presence of heroin. The reference to a Marquis test does not help the Government since it is a test relevant to a number of opiate alkaloids. (Tr. of October 9, 1968, p. 74), and is a non-specific test.[1] See 13 Amer. Juris., Proof of Facts, Annotated - Criminal Drug Addiction and Possession, 410-411.

This issue was raised by defendant's motions for acquittal (Tr. of October 9, 1968, pp. 77, 87), and even if it were not, would be such a case of plain error as to warrant cognizance by this Court. See McKenzie v. United States, 266 F. 2d 524 (10th Cir. 1959); Fitzpatrick v. United States, 410 F. 2d 513 (5th Cir. 1969).

II. 21 U.S.C. 174, PROVIDING FOR A PRESUMPTION OF KNOWLEDGE OF ILLEGAL IMPORTATION FROM THE FACT OF POSSESSION, AS APPLIED TO APPELLANT, IS UNCONSTITUTIONAL.

(WITH RESPECT TO THIS POINT, APPELLANT REQUESTS THE COURT TO REVIEW THE TRANSCRIPT OF OCTOBER 9, 1968 AND THE TRANSCRIPT OF DECEMBER 16, 1968, COUNTS THREE, SIX AND EIGHT OF THE INDICTMENT, DEFENDANT'S MOTION FOR DISMISSAL, HIS MOTIONS FOR ACQUITTAL, THE RULINGS THEREON, AND THE COURT'S CHARGE TO THE JURY. (Tr. of Pl. and Transcript of October 9, 1968))

The Third, Sixth and Eighth counts of the indictment in this case charged defendant with a violation of 21 U.S.C 174 (Tr. of Pl.). Mr. Norris was convicted on those counts and a heavy sentence imposed. Assum-

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1. The Marquis test, made available for field use, is commonly carried by narcotics officers. See 13 Amer. Juris., Proof of Facts, supra, p. 442.

ing, for the sake of argument, that with respect to counts Three and Six there was substantial evidence that the capsules taken from defendant contained heroin, there is a common issue as to his conviction on those counts, namely, the validity of 21 U. S. C. 174, as applied to appellant.

21 U.S.C. 174 makes criminal facilitation of concealment of, or sale, after importation of a narcotic drug by one who knows that it has been unlawfully imported. The statute provides further that if one charged with its violation is shown to have had possession of a narcotic drug, such possession "shall be deemed sufficient evidence to authorize a conviction unless the defendant explains the possession to the satisfaction of the jury."

It is our understanding that, commonly, the Government, after showing possession relies, without more, on this presumption to convict a defendant of violating this statute. In this case there was evidence of possession of a narcotic drug by defendant. There was no evidence, other than the force of the presumption that the narcotics were either illegally imported or that defendant knew that such narcotics had been illegally imported.

Before we discuss the constitutionality of this statute as applied to Mr. Norris, we may note that this is not a case where the ability of the Government to reach narcotic drug transactions rests upon the constitutionality of this particular statute. The legal arsenal of the Government, actual and potential, is ample for such purpose. But it is our positionthat this legal weapon as applied to this defendant - and to others in a similar position - is unconstitutional.

A. 21 U.S.C. 174 VIOLATES THE FIFTH AMENDMENT'S PROTECTION TO THE DEFENDANT AGAINST SELF-INCRIMINATION

We are not aware of any case in which this Statute was used as a basis for a directed verdict, that is, conclusive as to illegal importation or knowledge thereof. But since, as in this case(Tr. of October 9, 1968, pp.116-118), the trial court, inevitably, advises the jury that a conviction may rest merely upon the fact of possession unless rebutted, a conviction is almost a certainty if the defendant does not take the stand.

It is well known that the rate of conviction under 21 U.S.C. 174 is very high. The mathematical formula seems to be: proof of possession plus failure to take the stand equals conviction. In theory and in practice the effect of this statute is to say to the jury that if this defendant does not take the stand he may be presumed <u>beyond a reasonable doubt</u> to have knowledge of illegal importation. And thus, the defendant's presumption of innocence unless guilt is proven beyond a reasonable doubt becomes meaningless.

In this case the defendant took the stand in his first trial for a limited purpose, namely, to deny that he had sold narcotics to undercover agent Fairfax. The jury must have disbelieved him. But this still left the case in a posture where there was no proof as to illegal importation or knowledge thereof except for the statutory presumption. And, in the second trial defendant did not take the stand and again he was convicted by a statute acting as a witness rather than by oral or documentary evidence. As we shall demonstrate, Mr. Norris was faced with the choice of self-incrimination as to some other offense if he testified in rebuttal of the presumption or of conviction of the offense of which he was charged, if he did not so testify.

In 1968, the Supreme Court, in a series of cases held that statutes which subjected a defendant to a "real and appreciable risk of self-incrimination" could not be sustained. Marchetti v. United States, 390 U.S. 39 Grosso v. United States, 390 U.S. 62; Haynes v. United States, 390 U.S. 85 (1968)./ The statutes involved in those cases were not narcotic statutes. But in 1969 the Supreme Court reached the same result in a case involving marijuana acts very similar to the narcotic drug laws involved in this case. That case was Leary v. United States, 395 U.S. 6 (1969). There, the Court noted that under widely enacted state statutes possession of marijuana would entail an appreciable risk of prosecutiom, especially because of the statutory requirement of making such information available to state authorities.

Here, as in the Leary case, an attempt by the defendant to explain his possession of a narcotic drug would have put him in immediate, real and appreciable danger of incriminating himself under other laws. Thus, the Uniform Narcotics Act, 9B Uniform Laws 409-410(1966), widely adopted among the states, makes unlicensed possession of a narcotic drug a crime. This prohibition is embodied in the District of Columbia Code. D.C. Code (1967 Ed) 33402. And the federal narcotic tax laws, under some of which the defendant in this case was actually charged and convicted, would have hung over his head like the sword of Damocles. See 26 U.S.C. 4701 et seq.

The danger of a defendant such as Mr. Norris, attempting to explain that the narcotic drug he possessed was illegally imported, implicating himself under state laws is not merely a matter of theory:[2]

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2. "Possession is frequently the subject of a single criminal offence under federal and state law, part of the vast national network of statutory regulation of drug traffic set up under the health and welfare functions of the police power." 13 Am. Juris., Proof of Facts, Criminal Drug Addiction and Possession 394.

"The most important type of cooperation between the Bureau of Narcotics and Dangerous Drugs and state and local law enforcement agencies is the free exchange of information and mutual assistance in investigative and enforcement activities."[3] Department of Justice, Bureau of Narcotics and Dangerous Drugs(BNDD), Fact Sheet No. 1, p. 2.

The Government relies upon Ye Hem v. United States, 268 U. S. 178. That case upheld a conviction under 21 U.S.C. 174, against certain constitutional attacks. The very sketchy briefs and the record in that case made considered review difficult. The slight reference to the self-incrimination issue seems to have been entirely based upon the possibility of obloquoy if the defendant took the stand rather than the probability of persecution under other laws, and that argument was rejected by the Court. In the Leary case, the Supreme Court did not overrule Ye Hem but did question some of its reasoning.

The Ye Hem case was decided in 1925. An important difference between the self-incrimination risk then and now exists. At that time the Uniform Narcotics Act had not been adopted in any state--it was first adopted in 1931. See 9B Uniform State Laws. Perhaps for that reason neither counsel

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3. Before a Congressional Committee, a Police Commissioner of Detroit testified: "We have excellent cooperation. As a matter of fact, the Federal Bureau works so hand-in-hand with our local narcotics Bureau that sometimes the two are intermingled." Hearings before Subcom. On Improvements In The Federal Criminal Code, S. Com. on Jud., 84th Sess., Illicit Narcotics Traffic, Part 10, p. 4481.

nor the Court, in the Yo Hem case, addressed themselves to a risk of self-incrimination under state laws. As we have pointed out that is a very real risk at present when that Act has been adopted in almost every state.

The Government in cases of this sort has argued that the defendant in order to avoid the presumption need not admit possession, he can claim an alibi, etc. But the trouble with this argument is that not all--most do not--defendants have such defenses. This argument, therefore, is contrary to reality. And if a jury disbelieves a defendant advancing such a defense it is likely to be all the more inclined to convict him on the basis of the presumption as to which he has not directly testified.

The Supreme Court has noted that under 21 U.S.C. 174, the presumption imposes the burden of going forward on a defendant. Roviano v. United States, 353 U. S. 53. The defendant here, had a right, under the Fifth Amendment, not to suffer a penalty because of his silence. Malloy v. Hogan, 378 U. S. 1 (1964). In this case, he did suffer the penalty of criminal jeopardy at both federal and state levels. And, to put it another way, he had a right not to have his right to testify chilled by the probability of self-incrimination. United States v. Jackson, 390 U. S. 570 (1968).

B. 21 U.S.C. 174, AS APPLIED TO APPELLANT IS UNCONSTITUTIONAL BECAUSE IT DENIES HIM DUE PROCESS

There have been nice discussions as to whether presumptions are evidence. But, where as here, the statute says that on the basis of the presumption a defendant may be convicted and there is no other evidence as to necessary elements of the crime, then the presumption is to be regarded as evidence unless we are to say that such a defendant was convicted without evidence. And it is important to note that such "evidence" is not subject to cross-examination.

As we have noted, under 21 U.S.C. 174 a defendant possessing a narcotic drug is presumed to know that the drug was illegally imported. If the defendant does not successfully rebut the presumption he not only may be convicted for "concealment" of "sale" but almost certainly will be. As the Court pointed out in Wong Sun v. United States, 371 U. S. 471, 493 (1963), with respect to a possessor of heroin: "As to him, once possession alone is proved, the other elements of the offense, transportation and concealment with knowledge of illegal importation of the drug need not be separately demonstrated, much less corroborated."

Under these circumstances a court's instruction as to reasonable doubt coupled with an instruction that the jury may convict on the basis of the presumption not only contemplates a jury's disregard of the reasonable doubt part of the . . .

instruction but invites a jury to do so. This is all the more so since the statute does not merely say that from the fact of sale the jury may presume knowledge of illegal importation but says that such fact shall be sufficient evidence for a jury so to find. There is thus a shift not only in the burden of going forward--which entrenches upon both the privilege against self-incrimination and due process protection--but also in the burden of persuasion which offends due process concepts to an even greater degree.

In Bailey v. Alabama 219 U. S. 219, 235 (1911), the Supreme Court observed:

> It is not sufficient to declare that the statute does not make it the <u>duty</u> of the jury to convict, where there is no other evidence but the breach of the contract and the failure to pay the debt. The point is that, in such a case, the statute 'authorizes' the jury to convict. It is not enough to say that the jury may not accept that evidence as alone sufficient, for the jury may accept it, and they have the express warrant of the statute to accept it as a basis for their verdict."

So, in this case the jury could and did accept the statutory presumption as the basis of their verdict.

The Supreme Court, in the recent Leary case, struck down a similar marijuana statute, 21 U.S.C. 176a because it did not find a rational connection between the fact of possession and presumptive knowledge of illegal importation. In the Leary case the Court left open the rationality of 21 U.S.C. 174 which had been sustained in Ye Hem v. United States, 268 U. S. 178 (1925).

As we have noted the Ye Hem case seems to have been almost casually briefed, and a major ground for the decision in the case was that it would be easier for the defendant to produce evidence to negate the presumption than for the government to support it. But this "convenience" test was rejected by the Court in the Leary case. 395 U. S. 45.

Before we treat of the application of the rationality test to this case, we would first urge that the constitutional requirement of due process requires something more than "rationality." In this country a basic concept of due process is that a criminal conviction must be based upon guilt beyond a reasonable doubt; and, if the Government, as it has here, relies upon a presumption that presumption, to be valid, must not only have rationality but also must embody such degree of assurance as to warrant a reasonable belief that it is based upon a premise which is "beyond a reasonable doubt."

The Government, in cases pending before the Supreme Court, has argued that all heroin is illegally imported and therefore a jury may properly infer that a person possessing the drug would be aware of its foreign origin. This argument is defective in more than one respect. In the first place it is possible for drugs such as heroin to come into the hands of a possessor without an illegal importation source or, and this bears on the second presumption, knowledge.

In Morgan v. United States, 391 F. 2d 237(9th Cir. 1968), cert. den., 393 U. S. 853, the Court, in its opinion, noted that "the defense developed by cross-examination of the chemist who testified for the Government that the narcotic here in question could have been produced from poppies grown in various parts of the United States". p 238. We think the testimony of the Government witness in that case is significant enough to warrant its being set out in full:

Q Now, heroin hydrochloride comes in different colors, is that correct?

* * *

Q That is also white; now, you are an expert in this material; it is manufactured from what flower?

A Well, the morphine is extracted from the opium poppy.

Q And then what takes place?

A And then the morphine is treated chemically--the morphine is extracted from the opium poppy and the morphine is treated with chemicals, with either acetic anhydrate or acetic chloride, and that material, that forms a reaction and the heroin is formed.

Q I see.

A In other words, heroin doesn't occur naturally. It has to be manufactured.

Q It is manufactured chemically?

A Right.

Q And that, of course, can be done in this Country?

A Well, it would be a fairly simple operation if you had the morphine.

Q And the poppies also grow in the United States, don't they?

A Yes.

Q And, so, it is possible to grow the poppies in the United States and to conduct all the chemical operations in the United States?

A Well, if you had poppies and extracted the morphine from the poppies, you could make heroin, yes.

Q It is not too complicated a process?

A No.

Q And, of course, in looking at this material you can not tell whether or not it was made in the United States, can you - or can you?

A No, I can't say definitely, no, sir.

Q One way or the other?

A No, sir.

MR. HERDON: I think that is all.

REDIRECT EXAMINATION

By Mr. Swofford:

Q Mr. Gowans, where are the majority of the poppies grown in the world?

A Well, there are quite a number grown in Turkey and India at the present time.

Q Are there a lot grown in Mexico?

A Well, also there is some production in Mexico.

Q Do they require any sort of a special climate to grow?

A No; more or less a temperate climate. In other words, as long as there isn't extremes of temperature.

Q Could they grow in the United States then?

A Yes.

Q Are any being grown in the United States, or do you know?

* * *

A Well, I can say that poppies have been submitted to

me from parts of the Country in which I have found morphine present.

* * *

RECROSS EXAMINATION

By Mr. Herndon:

Q In other words, they have been submitted to you from parts of the United States?

A Yes.

Q And they grow well in Florida and Texas and California and parts of New Mexico and Arizona, don't they?

A Well, like I say, any place where there is not an extreme temperature contrast. Tr. of Jan. 4, 1967, Testimony of William J. Gowans, pp. 117-120.

Heroin is a derivative of opium customarily produced from morphine. 13 Am. Juris., Proof of Facts, Ann., Crime and Drug Addiction 4. The Opium Poppy Control Act, 21 U.S.C. 3188, et seq., is a recognition that the opium poppy is agriculturally growable in the United States. And see, Stutz v. Bureau of Narcotics, 56 F. Supp. 810 (N.D. Calif. 1944). And the opium poppy has been illegally grown here. Az Din v. United States, 232 F. 2d 283(9th Cir.), cert. den., 352 U. S. 827. Morphine may be legally imported and heroin can be made from it by a "tricky but not difficult process." Green v. United States, 383 F. 2d 199, 202(D.C. Cir. 1967).

Clandestine laboratories are a possible source of heroin. There are appreciable numbers of illegal sales of narcotics by those licensed to dispense them some of which are referred to in the annual reports of the Narcotics Bureau. And each year there are large numbers of thefts of narcotics. E.G. 1967 Annual Report of Bureau of Narcotics 43.

Secondly, with respect to the presumption of knowledge of illegal importation, we think that clearly it rests with the Government to show that there was strong likelihood of such knowledge.

As to a "pusher" or "peddler" such as defendant we know of no legislative history to support such a premise on the part of Congress, and we know of no study on this score by the government or otherwise to support such a presumption. Tot v. United States, 319 U. S. 463 (1943), dealt with a presumption which permitted a jury to infer from possession of a firearm that it was received in interstate commerce. In the Leary case the Supreme Court observed that in the Tot case the Court had held that because of the danger of overreaching it was incumbent upon the prosecution to demonstrate that the inference was permissible before the burden of coming forward could be placed upon the defendant. 395 U.S. The Court went on to say that the Ye Hem case had not considered this issue.

It may not be amiss to state that not only did counsel for appellant not know that all or most heroin was illegally imported but also that during the recent argument in the Turner case before the Supreme Court, Judge Stewart observed that until that case he was unaware of such a fact. Another example comes to mind. Until the advent of Castro, Cuba was a main source of sugar for the United States, but it would flout common sense to presume that all persons in the United States were aware of such a fact. This was so because most persons were not interested in the source; and so of heroin.

A basic irrationality of this statutory presumption is that it applies across the board to all classes of persons, to those who are experts or learned in narcotics law as well as to morons. The statute cannot be so applied and still be considered to be rational. Defendant was a "peddlar" of narcotics, apparently selling heroin on the street. The Court may take notice that the 14th street area in which this peddling took place was the scene of a riot last year, and a low income negro area. See Tr. of Dec. 16, 1968, pp. 11-12; Washington Post, Oct. 19, 1969, pp. 1 14th and U Street area. It is well recognized that slum sections of large metropolitan areas still account for the greatest numbers of known heroin users. BNDD, Fact Sheet No. 4, p. 2; see 13 Am. Juris., Proff of Facts, Criminal Drug Addiction and Possession 398. Racial minority groups make up a high degree of drug addicts. Ibid., and only at that level or slightly higher could a street peddler be able to have such addicts deal with him.

The hierarchy of the drug traffic has been said to be:

1. Criminal cartel importer
   a. Persons acting under their direction
   b. High level wholesalers
   c. Organized crime element
   d. Low level wholesalers on the neighborhood level.

The President's Commission on Law Enforcement and Administration of Justice, Task Force Report, Narcotics and Drug Abuse (1967)7.

We submit that as applied to the "pusher" in this case the presumption lacks rationality.

C. 21 U.S.C. 174, AS APPLIED TO APPELLANT, VIOLATES HIS RIGHT TO HAVE A JURY TRIAL UNDER A COURT'S SUPERVISION UNDER ARTICLE III, SECTION 2, CLAUSES 1 and 3, and THE SIXTH AMENDMENT

In the Leary case, Justice Black, in a concurring opinion,

thought that 21 U.S.C. 176a, which is similar to 21 U.S.C. 174, except that one deals with marijuana and the other with narcotic drugs, was invalid because it diluted a defendant's right to have a jury trial. We adopt and enlarge upon Justice Black's position, and assert that the application of 21 U.S.C. 174 to this defendant violates Article III, Section 2, Clause 1 and 3 of the Constitution as well as Amendment six to the Constitution. These constitutional provisions ensure to a criminal defendant a right to a jury trial, a right to confrontation of witnesses and a right to have a judge supervised trial in which his common law and procedural rights are preserved.

The concept of a right to a jury trial embodies the concept of a meaningful right. 21 U.S.C. 174, however, is designed to prevent a defendant from receiving the benefit of a jury's deliberations based upon their understanding of and inferences from the evidence before them. They are told that the statutory presumption is enough for them to make such inference without evidence thereon, even though if they had the facts before them on which such inference was based they might not have made such an inference. And the defendant instead of being confronted by a witness who may be cross-examined and discredited is confronted by a presumption enshrined in a statutory mandate.

Furthermore, although the statute does not make possession of narcotics a crime it says to the jury that they may convict from the fact of possession. It is submitted that a jury faced with such a situation is very likely to conclude that possession is the crime with which the defendant is charged.

As we have noted, because of this presumption conviction under the statute is almost automatic if the defendant does not take the stand, and, probably, only slightly less so if he does. This makes the jury function less as deliberative body and more as a ministerial unit to bring in a guilty verdict.

The Supreme Court has noted that "under the Federal Constitution the essential prerogatives of the trial judge as they were secured by the rules of the common law are maintained in the federal courts." Quercia v. United States, 289 U. S. 466, 469 (1939). But 21 U.S.C. 174 operates to deny him those prerogatives and to deny to the defendant the benefit of the exercise of those prerogatives. The trial judge, under this statute, cannot consider in his discretion a motion for a directed verdict or for acquittal based upon the evidence before him, namely, merely possession; he must submit the case to the jury because of the presumption.

III. 21 U.S.C. 4704(a) AS APPLIED TO DEFENDANT IN THIS CASE VIOLATES THE 5TH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION, AND VIOLATES DUE PROCESS BECAUSE OF ITS OPPRESSIVENESS

(WITH RESPECT TO THIS POINT, APPELLANT DESIRES THE COURT TO READ THE TRANSCRIPTS OF OCTOBER 9, and DECEMBER 16, 1968, THE INDICTMENT AND DEFENDANT'S MOTION TO DISMISS IN THE TR. OF PLEADINGS)

Much of what we have said as to the privilege against self-incrimination with respect to 21 U.S.C. 174 is applicable to 26 U.S.C. 4704(a), but there are appreciable differences between those statutes.

26 U.S.C. 4704(a), with limited exceptions as to doctors' use for patients, makes unlawful the purchase or sale of narcotic

drugs except in or from an original stamped package. A further provision makes the absence of tax paid stamps prima facie evidence of a violation on the part of one possessing narcotic drugs.

This statute is part of a network of interrelated statutes known as the Harrison Act, designed to regulate and prohibit traffic in narcotic drugs. Both commodity and occupational taxes are provided for and the same transaction may violate more than one part of this Act. Essential parts of the Act are provisions for registering and paying a stamp tax. It is a crime not to do so. 26 U.S.C. 4702(c), 4621-4624.

An early case held that this statute applied to unregistered possessors of narcotics. United States v. Wong Sing, 260 U.S. 18 (1922) Acc. Baughman v. United States, 301 F. Supp. 509 (D. Minn. 1969).

Treasury Department regulations require persons dealing in narcotics to pay a tax. 26 CFR 151.21. Under these regulations there is a detailed investigation of applicants for registration. 26 CFR 151.22-23. An inventory is required on the part of one applying for registration. 26 CFR 151.27. And these regulations provide that payment of the tax does not exonerate one from liability under state laws.

The Registration Form, Form 678, appears to apply to both narcotics and marijuana, since both are mentioned. The Form states that it is an application for "Registry and Special Tax Stamp, Opium, etc." The information required on the form includes name, business address, whether the applicant has any narcotics on

hand, inventory of taxable drugs and preparations on hand, name and description of drug or preparation, and quantity. The form advises that penalty for one required to register who does not or is late in doing so is $50.00.

Those registering have a record keeping duty imposed upon them. 26 U.S.C. 4732. Under Treasury Department regulations the District Director is to write on the stamp, before it is issued, the taxpayer's name, address and registry number. 26 CFR 151.111. Forms and records are open to inspection by federal, state, District of Columbia and other municipal officers. 26 U.S.C. 4773.

It is apparent that if a defendant such as Mr. Norris attempted to apply for tax stamps and to register, or to explain possession of a narcotic drug not in the original stamped package, he opens up a Pandora's box of applicable criminal statutes; federal, state, and those of the District of Columbia.

As stated in the Leary case, in connection with a similar marijuana statute, "the conclusion is inescapable that the statute was aimed at bringing to light transgressions of the [narcotic] laws." 395 U.S. 27. Appellant had ample reason to fear that transmittal to local officials that he was a recent unregistered dealer in heroin would prove a significant link in a chain of evidence establishing guilt under narcotic laws in effect.

So-called tax statutes which require a form of registry conducive to self-incrimination have an oppressiveness which has led the courts to strike them down, particularly where they are aimed at a group such as that to which the defendant belonged, one inherently suspect of criminal activities. Marchetti v. United

States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968); Haynes v. United States, 390 U.S. 85 (1968); Leary v. United States 395 U.S. 6, 18 (1969).

It is clear that an original stamped package cannot be obtained without registration which would require revealing incriminating information. As the Court noted in the Leary case, even the Government had doubts as to the constitutionality of these Narcotic Act provisions as applied to a non-registrant. 395 U.S. 22.

It is our position that as applied to this defendant, 26 U.S.C. 4704(a) denies defendant due process.

It is the Government's position, taken recently before the Supreme Court, that no dealings in heroin can be legally had,[4] with the exception of some seized heroin made available for experimental purposes, that registry with respect to heroin would not be permitted, nor in such case could a stamped package be obtained. The defendant, therefore, is put in a position where he can be prosecuted for not having an original stamped package which he could not have legally procured. And if he had procured it illegally he could have been prosecuted for not registering. This kind of overreaching, we submit, is repugnant to due process concepts.

We submit that when considered with other parts of the

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4. Thus, in the Government's brief in Turner v. United States, Sup. Ct. No. 190, the following statement appears: "Since heroin is neither produced in nor legally imported into the United States (see Supra, pp. 17-24), there would be no way to acquire it from a stamped package." Brief, p. 32. Similar assertions were made at the oral argument in that case.

Harrison Act, 21 U.S.C. 174, and state narcotic laws, as well as federal regulations, the statute is oppressive, creates a real and appreciable risk of self-incrimination and promotes a conviction for a defendant not doing something he could not legally have done.

IV. 26 U.S.C. 4705(a) AS APPLIED TO THIS DEFENDANT VIOLATES HIS 5TH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION AND DENIES HIM DUE PROCESS

(WITH RESPECT TO THIS POINT APPELLANT DESIRES THE COURT TO READ TRANSCRIPTS OF OCTOBER 9 and DECEMBER 16, 1968, AND MOTION TO DISMISS INDICTMENT (TR. OF PL.))

Much of what we have said in the preceding sections of this brief is applicable to this section, but there are differences in the statute involved.

26 U.S.C. 4705(a) prohibits one from selling or giving away narcotic drugs without a written order from the purchaser on a form issued by the Government in blank.

In Nigro v. United States, 276 U.S. 332 (1928) the Court refused to hold that this statute applied only to registered persons. In the words of the Government, "Under the Harrison Act, sale or transfer of narcotic drugs must be recorded on an official form." BNDD, Fact Sheet No. 1, p. 1.

Under 26 U.S.C. 4705(a) and supplementary regulations a sale of narcotic drugs can take place, legally, only pursuant to a written order upon which must be recorded incriminating information. The regulations provide for order forms for those who have registered. 26 CFR 151. 141 and a statute states the order form should be for sale to those who have registered and paid a special

tax. 26 U.S.C. 4075.

The order form--which is difficult to reproduce for mimeographing purposes--states that the purchaser of narcotic drugs must be registered for the fiscal year before using the form, and the "Supplier must be properly registered for the fiscal year before he may fill it in." There is a place for the date, name and address of the purchaser, as well as for "item," "catalog number, if any," "Number of packages," "size of package" and "name of narcotic". Then there are two spaces "To be filled in by consignor": the heading for these two spaces are: "Number of packages furnished" and "Date filled".

The form provides, also, for filling in the name and address of the consignor. In addition, it states that, "The person supplying the drugs or preparations ordered on this form will send a 'Triplicate' copy of the form to the narcotic district supervisor for the district, promptly at the close of the month during which it is filed." By statute the seller must preserve a copy for two years in such a way as to be readily available for inspection by federal, state, and local officers. 26 U.S.C. 4705(d); 26 CFR 151.479. Exemptions from requirements for order forms do not include persons such as defendant or purchasers from him. 26 CFR 211, 221.

Apparently the name of the seller may be inserted either by the seller or by the purchaser but must appear on the order form by the time of the sale.

We think, in this connection, that it is worth noting that the Seventh count of the indictment charged that the defendant

"purchased, sold, dispensed and distributed," not in or from an original stamped package, narcotic drugs. But at the trial the only evidence was as to possession. (Tr. of December 16, 1968, pp. 8-13). If the Government, in the absence of other evidence, relies upon an inference that he was a purchaser, then clearly as a purchaser, in order to obtain an order form he would have had to fill in incriminating information.

Without laboring the point, we also challenge the rationality of presuming purchase from possession.

The order form requirement is, thus, part of a vast statutory scheme designed to disclose narcotic dealings. And it may be noted, that, as in this case, commonly one arrested as a narcotics pusher is charged with violating a number of narcotic statutes. E.g. Gore v. United States, 357 U.S. 386 (1958).

For him to attempt to explain his possession without an order form is to surely implicate himself under one or more of the other federal narcotic laws, federal regulations, and state and District of Columbia narcotic laws.

There is no question but that the class of persons to whom the defendant belongs, "pushers," are a select group inherently suspect of criminal activity to which these statutes, particularly the one in question, are consciously directed. Oppressiveness attaches to it, and it falls within the strictures of the Marchetti, Grosso and Haynes cases, cited in the preceding section of this brief.

In the Nigro case, supra, the Court said that Congress intended to punish sales without registration and also to punish

sales without order forms from the purchaser. In Leary v. United States, 395 U.S. 6, 22 (1969), the Court noted that the Government itself had doubts as to the constitutionality of a Narcotic Act statutory network of compulsory register-order form requirements as applied to narcotic dealers to whom they were available. And even with respect to marijuana the order form requirement has been struck down, recently, in the 8th circuit. Baker v. United States, 412 F. 2d 1010 (8th Cir. 1969).

As we have noted, it is the Government's position that all dealings in heroin are forbidden. Therefore, an order form could not be procured for the purchase or sale of heroin. Under these circumstances, to prosecute one for a sale without an order when an order could be legally obtained for that purpose, is, we submit, to deny him due process.

V. 26 U.S.C. 4704(a) and 4705(a) CANNOT BE SUSTAINED AS TAX STATUTES UNDER THE TAX POWERS OF CONGRESS, AND AS APPLIED TO THE DEFENDANT IMPINGES UPON THE 10TH AMENDMENT

(WITH RESPECT TO THIS POINT APPELLANT DESIRES THE COURT TO READ THE TRANSCRIPTS OF OCTOBER 9 AND DECEMBER 16, 1968, and DEFENDANT'S MOTION TO DISMISS THE INDICTMENT (TR. OF PLEADING))

As indicated by this Court in the Leary case, narcotic laws exist in every state of the Union as well as in the District of Columbia. Such laws are peculiarly within the police power of the states.

26 U.S.C. 4704(a) and 4705(a) were sustained, many years ago, as tax statutes. Nigro v. United States, 276 U.S. 332 (1928); Casey v. United States, 276 U.S. 415 (1928). We submit, however,

that both the commodity and occupational tax rates were and have remained fixed at so low a level as to furnish intrinsic evidence that they are not revenue rates. See 26 U.S.C. 4705(c); 26 U.S.C. 4721(c); 26 CFG 151.41, 125-126. Total annual revenues for both marijuana and narcotic drug taxes have not exceeded $1,400,000 for a number of years. See Internal Revenue Annual Reports (1967).

Moreover, since under the Harrison Act narcotic drug traffickers would not have been allowed to pay a tax and register, the statute cannot be regarded as tax statute with respect to them. This is all the more so with respect to heroin as to which all dealings are forbidden. It is our understanding that no revenue has been or is expected to be collected from heroin traffic.

We submit that these statutes may not be sustained as tax statutes with respect to dealers in heroin. United States v. Constantine 296 U.S. 287 (1935).

VI. THE CONVICTION OF THE DEFENDANT ON COUNTS 7 AND 8 SHOULD BE REVERSED BECAUSE IT WAS THE RESULT OF AN ILLEGAL SEARCH

(WITH RESPECT TO THIS POINT APPELLANT DESIRES THE COURT TO READ TRANSCRIPT OF DECEMBER 16, 1968, PP. 5-26, 50-55)

The testimony is that defendant, pursuant to an arrest warrant, was arrested on the street (Tr. of December 16, 1968, pp. 8, 11). It is not clear at what time of the day the arrest was made, but it would appear that it was in the daytime since the arresting officers said they saw him from their cruiser. (Tr. of December 16, 1968, p. 12). At that time the arresting officers patted him for weapons and found none; at that time they

handcuffed him. (Id. p. 23). He was taken to the Narcotics Bureau and at 11:35 P.M. was searched and a packet seized from his pocket; the packet contained a narcotic drug. (Tr. of December 16, 1968, pp. 10, 24, 25).

We start from the premise that the fourth amendment to the Constitution protects the sanctity of the person from unreasonable searches by government agents.

It is clear that when the second search was made without a search warrant it was not made in order to look for a weapon. It was a search made without a search warrant, sometime after the arrest, to look for incriminating evidence. See Tr. of December 16, 1968, p. 26. There was no showing of any information leading to a reasonable belief that between the time of his arrest and the time of his second search defendant had procured a weapon or had had one at the time of his arrest. And there was no showing of probable cause to believe that at the time of his arrest he had narcotics in his possession. Cf. Sibron v. United States, 392 U.S. 40 (1968).

Apt is the observation of the Supreme Court in the Sibron case: "The search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception--the protection of the officer by disarming a potentially dangerous man." p. 65. Also in point is the statement by the Court in Preston v. United States, 376 U.S. 364, 367 (1964): "Once an accused is under arrest and in custody then a search made at another time without a warrant is simply not

incident to the arrest." And see Brett v. United States, 412 F. 2d 401 (5th Cir. 1969).

Counsel for defendant duly moved to suppress the use of the fruits of this illegal search, upon which defendant was convicted. (Tr. of December 16, 1968, pp. 5, 50). That motion, we submit, should have been granted.

VII. DEFENDANT WAS DENIED NECESSARY PROCEDURAL SAFEGUARDS IN HIS SENTENCING ON COUNTS 7 AND 8.

(WITH RESPECT TO THIS POINT APPELLANT DESIRES THE COURT TO READ TRANSCRIPT OF DECEMBER 16, 1968, pp. 64-65; TRANSCRIPT OF DECEMBER 20, 1968; MOTION FOR REDUCTION OF SENTENCE, TR. OF PL. 36)

As the record shows, defendant's counsel was not given an opportunity to be heard on defendant's behalf at the time of his sentencing by Judge Green. (Tr. of December 20, 1968). Nor was he or defendant given an opportunity to read the presentencing report and they were not advised of its contents. (Id., and his motion for reduction of sentence was peremptorily denied (Tr. of Pl. 36)). The most severe sentence imposed--15 years--was the result of this procedurally defective sentencing process.

It may be noted that in connection with the sentencing of defendant, Judge Green probably was aware of defendant's conviction on the first six counts (Tr. of December 16, 1968, p. 65). But the record does not show that she was aware that an appeal had been taken from such conviction, a fact which counsel, if given the opportunity, undoubtedly would have adduced.

Sentencing is an important part of a trial. To a defendant it may be the most important.

The necessity for due process in the course of sentencing has been receiving increasing recognition. See, Note, Procedural Due Process at Judicial Sentencing For Felony, 81 Harv. L. Rev. 821 (1968). Moreover, the right of a defendant to be represented by counsel at his sentencing is established. Mempha v. Rhay, 389 U.S. 128 (1967); United States v. Meyers, 374 F. 2d 707 (3d Cir. 1967).

The Federal Rules of Criminal Procedure require that "before imposing sentence the Court shall afford counsel an opportunity to speak on behalf of the defendant." Rule 32. Under this rule counsel is entitled to a meaningful opportunity to be heard. Gadsden v. United States, 96 U.S. App. D.C. 162, 223 F. 2d 627 (1955); Baker v. United States, 407 F. 2d 618 (7th Cir. 1969).

Subdivision (C) of Rule 32 of the Rules of Criminal Procedure provides that the Court "may disclose" to defendant or to his counsel the presentence report. We think it is not only better procedure to allow counsel for the defendant to see the pre-sentencing report prior to sentencing, see United States v. Perchalla, 407 F. 2d 821 (4th Cir. 1969), but we believe that constitutional due process requires that he be given that opportunity, so that what is rebuttable therein may be rebutted and what is mitigible may be mitigated.

If error in the presentencing report may be the basis of an application for relief under 28 U.S.C. 2255, Baker v. United States, 388 F. 2d 931 (4th Cir. 1968), cert. den., 390 U.S. 1039, it would seem all the more a matter of proper procedure,

if not a matter of right, --which we believe it is--to provide an opportunity for counsel for defendant to become acquainted with the contents of a presentence report before the sentencing. See Hancock Bros., Inc. v. Jores, 293 F. Supp. 1229 (N.D. Calif. 1968)

If we are correct in our constitutional contentions, this point becomes academic; if not, however, we submit, these procedural errors call for a remand on the question of sentencing. And this would be true if we are correct only with respect to our first point.

VIII. THE ISSUES RAISED ARE REVIEWABLE AND SHOULD BE REVIEWED BY THE COURT

It may be noted that some of the sentences involved in this case are concurrent with other sentences also involved on appeal. If the Court should agree with us as to certain counts and not as to others, the fact that concurrent sentences are involved should not be a cause of denial of review by this Court. Collateral effects may follow such as probation or parole privileges, civil rights under state laws, effect for future impeachment purposes; and direct effects such as the effect of such convictions on the thinking of the judge with respect to sentencing on other counts.

In Benton v. State of Maryland, 89 S. Ct. 481 (1968) after the case had been argued, the Court restored it for reargument on a matter not specified in the original writ:

> Does the 'concurrent sentence doctrine' enunciated in Hirabayashi v. United States, 320 U.S. 81, and subsequent cases, have continued validity in the light of such decisions as Ginsberg v. New York, 390 U.S. 629, 633, no. 2; Peyton v. Rowe, 391 U.S. 54, Carafas v. La Vallee 391 U.S. 234, 237-38, and Sibron v. New York, 392 U.S. 40, 50-58.

In its subsequent opinion, 395 U.S. 784 (1969), the Court refused to apply that doctrine and cautioned against its use. See also, United States v. Cook, 312 F. 2d 293 (3d Cir. 1969).

Most of the issues discussed in this brief were raised by counsel for the defendant in motions to dismiss the indictment (Tr. of Pl.), motions to acquit, (Tr. of October 9, 1968, pp. 77, 87; Tr. of December 16, 1968, p. 50), motion to dismiss count 8, (Tr. of December 16, 1968, pp. 55-56), motion to suppress (Tr. of December 16, 1968, pp. 5, 50 et seq.), motion for reduction of sentencing (Tr. of Pl. 36).

As to the issues of self-incrimination and jury trial, and the issue of absence of heroin, it may be questionable whether they were clearly raised, but this case was tried before the Leary decision was handed down in which these issues were given significance. It would be a grave injustice, therefore, for this Court not to consider such important issues. And under the plain error rule it would be eminently proper for the Court to consider them. See 28 U.S.C. 2106; Rule 52 of the Rules of Criminal Procedure; Leary v. United States, 295 U.S. 6 (1969); Baker v. United States, 412 F. 2d 1010 (8th Cir. 1969); United States v. Haywood, 411 F. 2d 555 (5th Cir. 1969); Tillery v. United States, 411 F. 2d 649 (5th Cir. 1969); O'Neil v. United States, 411 F. 2d 139 (3d Cir. 1969).

CONCLUSION

For the foregoing reasons, appellant respectfully requests that the Court reverse the conviction of the appellant on all

counts. If the Court does not sustain the points made by appellant for reversal, appellant asks that the case be remanded for resentencing under counts 7 and 8.

Respectfully submitted

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Appointed by the Court